

FEDERAL CIRCUIT COURT OF AUSTRALIA

MULTANI v MINISTER FOR IMMIGRATION & ANOR [2020] FCCA 155

Catchwords:

MIGRATION – Application to review decision of the Administrative Appeals Tribunal – Partner visa – whether the Tribunal failed to consider a matter in reg.1.15A(3) of the *Migration Regulations 1994* (Cth) such as to fall into jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 359A, 360

Migration Regulations 1994 (Cth), reg.1.15A

Cases cited:

Casey v Repatriation Commission (1995) 39 ALD 34; [1995] FCA 847

He v Minister for Immigration and Border Protection (2017) 255 FCR 41; [2017] FCAFC 206

Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 123; [2018] HCA 34

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40

Minister for Home Affairs v Buadromo (2018) 362 ALR 48; [2018] FCAFC 151

Minister for Immigration and Border Protection v Stretton (2016) 237 FCR 1; [2016] FCAFC 11

Minister for Immigration and Border Protection v SZSRS (2014) 309 ALR 67; [2014] FCAFC 16

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18

Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594; [2011] HCA 1

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16

Minister for Immigration and Citizenship v SZRKT (2013) 212 FCR 99; [2013] FCA 317

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 325; [2001] HCA 30

Plaintiff M174/2016 v Minister for Immigration and Border Protection (2018) 353 ALR 600; [2018] HCA 16

Re Minister for Immigration and Multicultural Affairs Ex parte Applicant S20/2002 (2003) 77 ALJR 1165; [2003] HCA 30

SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609;

[2007] HCA 26

Applicant: MANINDERPAL SINGH MULTANI

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: SYG 1529 of 2016

Judgment of: Judge Barnes

Hearing date: 5 December 2018

Date of Last Submission: 8 February 2019

Delivered at: Sydney

Delivered on: 30 January 2020

REPRESENTATION

The Applicant: In person

Counsel for the Respondents: Mr Kaplan

Solicitors for the Respondents: DLA Piper

ORDERS

(1) The application is dismissed.

(2)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1529 of 2016

MANINDERPAL SINGH MULTANI

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for review of a decision of the Administrative Appeals Tribunal (the Tribunal), dated 26 May 2016, affirming a decision of a delegate of the First Respondent not to grant the Applicant a Partner (Residence) (Class BS) visa.
2. The Applicant, a citizen of India, applied for a Partner visa on 3 May 2012. He provided some supporting documentation. He was granted a temporary Partner visa on 16 September 2013.
3. According to the delegate, the Department wrote to Mr Multani's representative on 4 April 2014 to request further information in relation

to his application for a permanent Partner visa and there was no response to this request (although it is apparent from the Courtbook that there was a response on 18 June 2013 to a request for information dated 4 April 2013).

4. In any event, on 20 October 2014 the Department emailed the Applicant's representative, repeating a request for further information. The representative sought an extension of time, which was granted. According to the delegate, no further response was received by the Department.
5. On 26 March 2015, a delegate of the First Respondent refused to grant Mr Multani a permanent Partner visa. In reasons of that date, the delegate stated that the information on the departmental file was relevant to whether or not Mr Multani was the spouse or de facto partner of his sponsor at the time the visa application was lodged. However the delegate found that at the time of decision, the Department had no information that demonstrated that Mr Multani continued to be the spouse or de facto partner of the sponsor and was not satisfied that he was the spouse (as defined in s.5F of the *Migration Act 1958* (Cth) (the Act)) of his sponsor at the time of the decision. The delegate found that Mr Multani did not meet the requirements of cl.801.221(2A) in Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).

The Law

6. "Spouse" is defined in s.5F of the Act as follows:
 - (1) *For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.*
 - (2) *For the purposes of subsection (1), persons are in a married relationship if:*
 - (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
 - (b) *they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and*

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

7. As provided for in s.5F(3) of the Act, reg.1.15A of the Regulations relevantly states:

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

- (iv) whether one person in the relationship owes any legal obligation in respect of the other; and*
- (v) the basis of any sharing of day-to-day household expenses; and*
- (b) the nature of the household, including:*
 - (i) any joint responsibility for the care and support of children; and*
 - (ii) the living arrangements of the persons; and*
 - (iii) any sharing of the responsibility for housework; and*
- (c) the social aspects of the relationship, including:*
 - (i) whether the persons represent themselves to other people as being married to each other; and*
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) any basis on which the persons plan and undertake joint social activities; and*
- (d) the nature of the persons' commitment to each other, including:*
 - (i) the duration of the relationship; and*
 - (ii) the length of time during which the persons have lived together; and*
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) whether the persons see the relationship as a long-term one.*

...

8. The class of visa in issue in this case was a Class BS visa, which is one of the visa classes referred to in reg.1.15A(2) of the Regulations.

Review Application

9. Mr Multani sought review by the Tribunal on 7 April 2015. His migration agent sent various documents to the Tribunal in support of the review application, including bank statements, a residential tenancy agreement and statutory declarations made by Mr Multani and his sponsor (Ms Ralph).
10. On 10 March 2016, the Tribunal invited Mr Multani to attend a Tribunal hearing on 16 May 2016. The invitation letter informed Mr Multani that the Tribunal member may wish to take evidence from his sponsor, Ms Ralph, and asked him to arrange for Ms Ralph to attend the hearing.
11. Prior to the hearing the Applicant's agent provided a written submission to the Tribunal. The submission took issue with the delegate's decision on the basis that documents were in fact submitted to the Department by email of 30 December 2014. The agent provided copies of these documents to the Tribunal.
12. Mr Multani and his migration agent attended the Tribunal hearing on 16 May 2016. Ms Ralph did not attend. The only evidence before the court of what occurred during the hearing is the Tribunal's account in its reasons for decision.

The Tribunal Decision

13. In its reasons of 26 May 2016, the Tribunal found that it was not satisfied that Mr Multani satisfied the criterion in cl.801.221(2) in Schedule 2 to the Regulations, in that it was not satisfied that he was the "*spouse*" of his sponsor at the time of its decision. It found that none of the alternative criteria in cl.801.221 were "*relevant*" in this case.
14. The Tribunal stated that it had considered the documents in the departmental file and those provided to it, as well as Mr Multani's oral evidence. It referred to the definition of "*spouse*" in s.5F of the Act and to the requirement in reg.1.15A(2) to consider all of the circumstances of the relationship, including the matters specified in reg.1.15A(3) of the Regulations.

15. The Tribunal acknowledged that Mr Multani had told it that he met Ms Ralph at a nightclub in 2011, that they started dating and that their relationship developed quickly. He claimed that he proposed in December 2011. They married in March 2012. The Tribunal was satisfied that the marriage was valid.
16. In considering the nature of the household (see reg.1.15A(3)(b)), the Tribunal had regard to the fact that Mr Multani's oral evidence about his and his sponsor's living arrangements was inconsistent with information he had provided to the Department in a statutory declaration of May 2013. The Tribunal recorded that Mr Multani had said in the hearing that Ms Ralph had moved in to his home in Ramsgate when they married, that they lived there together and that they then moved to Allawah about a year later. He said that at the time of the Tribunal hearing they lived in a three bedroom apartment with another friend, shared housework and cooking and often shared meals when he was not working.
17. However, the Tribunal pointed out that in his statutory declaration of May 2013, Mr Multani had declared that Ms Ralph moved into his home some time before their marriage. His explanation for this discrepancy was that she often stayed at his home after they started a relationship, but that she did not move in permanently until they married. The Tribunal recorded that it then raised with Mr Multani the fact that in his statutory declaration of May 2013 he had claimed that Ms Ralph moved into his home because she wanted to move out of her parents' home, that he did not tell her that he liked her before she moved in and that the relationship started after she started living in his home. The Tribunal put to Mr Multani that this was inconsistent with his oral evidence that Ms Ralph began to spend time at his home after they started a relationship, but did not move into his home until they married. It recorded that Mr Multani had provided no explanation for this inconsistency.
18. The Tribunal also had regard to the fact that, as it had observed at the hearing, information in the Department's files referred to the fact that Ms Ralph had substance abuse issues. It had asked Mr Multani if Ms Ralph had spent any time away from their home because of those issues and he said that this was not the case. However the Tribunal

noted that in Ms Ralph's statutory declaration of August 2013 (which Mr Multani had provided to the Department) she had declared that she went to a residential detoxification facility for the fourth time in June 2013 and that "*as per the detox centre, I am required to stay at my parents (sic) address*". The Tribunal recorded that it suggested to Mr Multani that this meant that Ms Ralph had been away from their home at the facility and then at her parents' home from June 2013 to the time of her statement and thereafter. Mr Multani was recorded as saying that this was not the case. He claimed that Ms Ralph had stayed at the facility only one or two nights and that he did not know about any requirement that she stay with her parents.

19. The Tribunal did not accept that Ms Ralph's statement referred to an absence of only one or two nights. It found that Mr Multani's evidence was inconsistent with Ms Ralph's statement about her living arrangements in June to August 2013 and that he had not explained the inconsistency. It continued (at paragraph 15):

In the absence of any credible explanation, the Tribunal infers Mr Multani's evidence about a shared household is inconsistent with the documents he provided to the Department because it is not true. It does not accept his evidence of past or current cohabitation with Ms Ralph. It finds they were not living together when she (sic) applied for the visa or and have lived separately and apart since then.

20. The Tribunal then stated that before coming to this conclusion it had taken into account a rental tenancy agreement for the Allawah property and correspondence from a real estate agent with the names of both Mr Multani and Ms Ralph on it. However the Tribunal gave no weight to these documents in light of the inconsistencies to which it had referred. It also observed that these documents showed that Ms Ralph was listed as a tenant of the property, but "*do not demonstrate that she has lived there at any time*".
21. The Tribunal turned to financial aspects of the relationship (reg.1.15A(3)(a)) recording, among other things, Mr Multani's evidence about his employment, and the fact that while he claimed that Ms Ralph received income support from Centrelink, he could not say what sort of payment she received. He said that he paid most of the bills and the rent because Ms Ralph did not have an income. He stated

that she had not been correct to claim in her November 2014 statement that they shared the rent. He claimed that they had a joint bank account and that Ms Ralph had a card for a bank account in his name that they used for expenses such as grocery shopping. He told the Tribunal that they did not own any joint assets. According to the Tribunal, he did not give any evidence of joint debts.

22. The Tribunal had regard to the fact that Mr Multani had provided bank statements for the joint bank account from November 2012 to February 2014, but not more recent statements. It also had regard to his evidence that they used the money in this account to pay for insurance. However it found that there were no regular deposits into the account and that they did not use it for most household expenses. The Tribunal found that the joint bank account and statements did not demonstrate financial interdependence or any trust in financial matters between Mr Multani and Ms Ralph.
23. The Tribunal observed that (as it had noted at the hearing) from November 2013 the bank had addressed the statements to Mr Multani and Ms Ralph at the home address of Ms Ralph's parents. In so far as Mr Multani claimed that this was because it was the address on Ms Ralph's identification documents when they opened the bank account, the Tribunal noted that the bank had addressed earlier statements from February 2013 to Mr Multani and Ms Ralph at the Allawah address. It was of the view that this indicated that one of them had advised the bank of a change of address, from Allawah to Ms Ralph's parents' home. The Tribunal found that this was not consistent with Mr Multani's explanation and that he had provided no other reason for the bank using Ms Ralph's parents' address from November 2013.
24. The Tribunal stated that it had "*no evidence to corroborate Mr Multani's evidence of financial dependence by Ms Ralph at the date of hearing*", noting that he had told it that Ms Ralph's earlier written statement about their finances was incorrect. The Tribunal found that there were unexplained inconsistencies in the bank statements for a past period and that those statements did not demonstrate financial interdependence. It also found that Mr Multani and Ms Ralph had no joint assets or debts. Having found that they did not live together, the Tribunal inferred that they did not pool their financial resources. It did

not accept Mr Multani's evidence that he met regular expenses for Ms Ralph and was not satisfied that there was any "*ongoing*" financial relationship between Mr Multani and Ms Ralph.

25. In relation to the social aspects of the relationship (reg.1.15A(3)(c)), the Tribunal acknowledged that Mr Multani had provided a 2012 statement from a friend of Ms Ralph and 2013 and 2014 statements from two of his friends which attested to them being a couple at those times (although it noted that one of Mr Multani's friends referred to his sponsor by an incorrect first name). The Tribunal found that these statements were "*general and unconvincing*" and that, in any event, they were not evidence that friends and family "*currently*" recognised Mr Multani and Ms Ralph as a couple or that they represented themselves in that way at the time of the Tribunal decision.
26. The Tribunal also acknowledged that Mr Multani gave evidence about spending time together with friends and Ms Ralph's family and had provided a copy of an invitation to a birthday party addressed to both of them (that was dated December, but with no year). However, it also noted that, when asked, Mr Multani could not give the name of Ms Ralph's only sibling or her best friend. His explanation for this was that he had not spent very much time with her family and that Ms Ralph avoided her friends because she did not want to use drugs.
27. In this context, the Tribunal did not find the documentary evidence convincing. It stated that Mr Multani was not a credible witness and that it did not accept his oral evidence without credible corroboration. It was not satisfied that at the time of decision Mr Multani and Ms Ralph represented themselves as a couple, that their friends and family saw them in that light or that they planned and undertook social activities together.
28. In relation to the nature of commitment (reg.1.15A(3)(d)), the Tribunal acknowledged Mr Multani's evidence was that he had a relatively lengthy relationship with Ms Ralph. However the Tribunal did not accept that they had lived together for approximately four years. In so far as Mr Multani claimed to provide companionship and emotional support to Ms Ralph, the Tribunal had regard to the fact that he also said that he did not discuss her addiction issues with her, could not say what drugs she used and did not know the name of her sister or her best

friend. The Tribunal was of the view that Mr Multani's lack of basic knowledge about Ms Ralph's life demonstrated that they did not spend time together at the time of decision and that Mr Multani did not provide her with emotional support in difficult times.

29. The Tribunal referred to the fact that the hearing invitation had advised Mr Multani that the Tribunal might want to speak to Ms Ralph. It noted that the outcome of the review was important to Mr Multani. It recorded that it had asked him why Ms Ralph had not accompanied him to the hearing to give evidence about the relationship and to support him and that while Mr Multani had initially said that she had work to do, when questioned about this, he said that it was personal work "*with her parents*". The Tribunal recorded that when questioned further, Mr Multani could not say what Ms Ralph had to do or why it would have priority over providing evidence to support his application and supporting him during the hearing process.
30. The Tribunal observed that at the hearing it also told Mr Multani that it would contact Ms Ralph by telephone if he wished, to which he responded that he thought her phone would be off. The Tribunal offered to provide Mr Multani with some time to contact Ms Ralph, but he declined this offer. The Tribunal inferred from this that Ms Ralph did not provide Mr Multani with emotional support or company in difficult times and, more generally, that she would not corroborate his evidence of a committed relationship.
31. The Tribunal also recorded that when it asked Mr Multani about the future of the relationship, he said that they planned to purchase their own home. However the Tribunal did not accept Mr Multani's evidence that he and Ms Ralph lived together at the time of the decision and did not accept that they planned to set up a home in the future. It found that they did not see themselves as having a long-term relationship.
32. In conclusion, the Tribunal referred to its finding that Mr Multani and Ms Ralph did not live together. It was of the view that there was no reason to infer that their separation was anything other than permanent. It found that it had no convincing evidence of financial interdependence and did not find that they had represented themselves as a couple or socialised together at any relevant time. It concluded

that they did not provide each other with company or emotional support and did not see themselves as having a long-term relationship. The Tribunal observed that the evidence suggested that they had contrived the relationship to obtain a positive migration outcome for Mr Multani. The Tribunal found that their relationship was “*neither genuine nor continuing*” and that they did not have a “*mutual commitment to a shared life*” as husband and wife.

33. The Tribunal acknowledged that the couple may be validly married, but found that they did not otherwise meet the definition of a married couple and that Mr Multani was therefore not Ms Ralph’s spouse “*at the time of [its] decision*” and did not satisfy the criterion in cl.801.221(2) in Schedule 2 to the Regulations. It therefore affirmed the decision to refuse to grant him a permanent Partner visa.

These Proceedings

34. At the final hearing of this matter, Mr Multani, who had not filed pre-hearing submissions, sought an adjournment on the basis that he was not currently in touch with his wife, was trying to get in touch with her and would then be able to provide more documents to the court. An adjournment on that basis was refused. He then told the court that he had not received a copy of the Courtbook which had been sent to the last residential address he had notified to the court. The solicitor for the First Respondent provided Mr Multani with a spare copy of the Courtbook. The parties were given the opportunity to make post-hearing submissions in relation to any matters raised by material in the Courtbook as well as in relation to the issue of whether the Tribunal had erred in failing to consider any matter it was required to consider under reg.1.15A of the Regulations in light of the decision of the Full Court of the Federal Court in *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41; [2017] FCAFC 206 (the *He* issue).
35. After the hearing the Applicant filed detailed written submissions which addressed a number of matters, but not the *He* issue. The First Respondent responded to the new issues raised by the Applicant. The Applicant did not take the opportunity to file submissions in reply.

Procedural Fairness Issue

36. It is convenient to consider first the grounds in the review application. Ground 1 is a general contention that the Applicant was denied procedural fairness. However, when asked about this at the hearing, Mr Multani stated that he was not saying that he was denied procedural fairness. Rather, his concern was that he had given all the documents relating to his case to his lawyer and he did not know what the lawyer had done with them. He claimed that the lawyer was supposed to lodge the documents with the Department and said that he had, but the Department said that it never received those documents.
37. It is the case that the delegate's decision was made on the basis that Mr Multani's then representative had failed to provide further requested information to it and that Mr Multani, through his agent, told the Tribunal that in fact documents had been provided to the Department prior to the time of the Tribunal decision. However, it is also apparent from the Courtbook that copies of those documents were provided to and taken into account by the Tribunal, which did not make its decision on the basis of an absence of "any" post-application supporting documentation. The Tribunal's consideration of the material before it is addressed below.
38. As the First Respondent pointed out, there is nothing in the material before the court to suggest that the Tribunal failed to comply with its obligations in Division 5 of Part 5 of the Act, in particular, ss.359A and 360 of the Act.
39. As to s.359A, the documents to which the Tribunal had regard, such as the statutory declarations and bank statements, were either information that the Applicant himself had given to the Department in support of his visa application or to the Tribunal and hence within the exceptions in s.359A(4) of the Act or did not amount to information that was the reason or part of the reason for affirming the decision under review in that they did not, in their terms, amount to a rejection, denial, or undermining of the Applicant's claims to satisfy the criteria for the grant of a permanent partner visa (cf *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26 at [17], and see *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 353 ALR 600; [2018] HCA 16 at [9] per Gageler, Keane and

Nettle JJ). In relation to s.360 of the Act, there is nothing in the material before the court, in particular in the Tribunal's written statement of reasons, to raise any concern that any dispositive issue was not drawn to the attention of Mr Multani during the Tribunal hearing.

40. Ground 1 is not made out.

Failure to consider documentary evidence issue

41. The second ground of review is an unparticularised assertion that there was a failure by the Department and the Tribunal to consider all the material provided. In so far as Mr Multani seeks review of the delegate's decision, that decision is not reviewable in these proceedings.
42. Prior to and at the hearing, Mr Multani did not identify any particular document that the Tribunal overlooked. In the absence of any particulars, such a broad contention does not establish jurisdictional error. The issues raised in post-hearing submissions are considered below.

Failure to grant visa issue

43. The third issue or ground raised in the application was a contention that there was an "error" in the Tribunal's decision. Mr Multani told the court that his concern was that he gave the Tribunal "*whatever they wanted*" but that they did not look into it and that his application was rejected. He conceded that his concern was that the Tribunal did not believe him. To the extent that he seeks merits review, merits review is not available in this court.
44. I also understood the general contention that the Tribunal did not "*look into*" the application or the material provided as an assertion that the Tribunal failed to consider cogent, critical material in a manner constituting jurisdictional error in the sense consider in *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; [2013] FCA 317. However, as indicated, at the hearing Mr Multani did not identify any particular material to which the Tribunal failed to have regard.

45. In its reasons for decision, the Tribunal referred to those documents that it considered relevant to the review, such as the statutory declarations by the Applicant and his sponsor, bank statements, tenancy agreement and supporting statements as outlined above. It is not apparent that it failed to have regard to any particular critical material such as to demonstrate a failure to perform its statutory task in the manner considered in *SZRKT* or *Minister for Immigration and Border Protection v SZSRS* (2014) 309 ALR 67; [2014] FCAFC 16.
46. As pleaded, this ground is not made out.

Post-hearing submissions

47. In post-hearing submissions the Applicant addressed the Tribunal's approach in considering each of the matters specified in subparagraphs (a) to (d) in reg.1.15A(3) of the Regulations. In essence, the submissions took issue with the weight the Tribunal gave to particular evidence before it and contended that it took irrelevant considerations into account, although the submission can also be seen as asserting a failure to consider aspects of the evidence and documents Mr Multani provided.
48. The First Respondent submitted that none of the allegations in the Applicant's submissions gave rise to jurisdictional error.
49. In relation to the Tribunal's findings about the nature of the household (reg.1.15A(3)(b)), the Applicant submitted generally that the Tribunal had "*misread*" the material before it. It was claimed that he had given evidence to the Tribunal that he and Ms Ralph had been living together in different houses at different times and noted that he had provided a tenancy agreement and correspondence from the real estate agent with both names on it. He contended that the Tribunal had unreasonably refused to give any weight to this evidence and had given no consideration to his evidence of the household activities and responsibilities he shared with Ms Ralph.
50. In addition, it was submitted that the Tribunal had "*misread*" the statutory declarations Ms Ralph provided in support of the visa application. In this context Mr Multani contended that although it was on the record that Ms Ralph had substance abuse issues, the Tribunal

had failed to consider whether it should give any weight or credit to a statement made by someone with serious substance abuse problems.

51. In addition, in so far as the Tribunal relied on Ms Ralph's statutory declaration despite the fact that she did not appear before it to "*affirm*" the statutory declaration, the Applicant contended that such evidence was inadmissible hearsay and could not have been used by the Tribunal for any purpose, including finding inconsistencies in his claims and evidence. It was then submitted that although the Tribunal was not bound by the rules of evidence, that did not mean that it could not apply the rules of evidence. It is not entirely clear what was meant by this submission, which also referred to the remarks of Hill J in *Casey v Repatriation Commission* (1995) 39 ALD 34; [1995] FCA 847 at 38 that: "*The criterion for admissibility of material in the tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance*".
52. Mr Multani submitted that the Tribunal's acceptance of and reliance upon Ms Ralph's statutory declaration was not only in breach of the rules of evidence, but also a breach of procedural fairness.
53. First, it has not been established that the Tribunal failed to have regard to any material or evidence relating to the nature of the household. As to the evidence from the real estate agent, the Tribunal expressly stated that it had taken this material into account before coming to its conclusion that the couple did not live together. It gave no weight to these documents in light of the inconsistencies to which it had referred and what such documents established. It did not reject this potentially corroborative material solely on the basis of a general rejection of the Applicant's credibility (cf *Re Minister for Immigration and Multicultural Affairs Ex parte Applicant S20/2002* (2003) 77 ALJR 1165; [2003] HCA 30 at [49]). The fact that the paragraph referring to this evidence followed the Tribunal's conclusion in this respect does not indicate a failure to consider either the evidence as a whole or this particular evidence. The weight to be accorded to this evidence was a matter for the Tribunal.
54. More generally, it was open to the Tribunal, and not suggestive of unreasonableness, to reject the truth of Mr Multani's evidence of cohabitation on the basis of the issues about his evidence it discussed

in its reasons, including inconsistencies and the absence of any credible explanation.

55. As the First Respondent submitted, contrary to the Applicant's submission it has not been established that the Tribunal "*misread*" any material before it or that it unreasonably refused to give any weight to the Applicant's evidence, including evidence that he and Ms Ralph had lived together in different houses at different times. It is notable that in its reasons for decision, the Tribunal summarised the various iterations of evidence about where Mr Multani and Ms Ralph lived. However as indicated, it had regard to the fact that Mr Multani's oral evidence in this respect was inconsistent with his own statutory declaration of May 2013 as well as with Ms Ralph's statutory declaration of August 2013 and also to the absence of an explanation for inconsistencies. The Tribunal found that the couple were not living together when Mr Multani applied for the visa and that they had lived separately and apart since then. The Tribunal's approach to the documentary and oral evidence in this respect has not been shown to involve a misunderstanding or misreading of the evidence or a failure to consider evidence. The finding of inconsistency in the evidence about cohabitation and the nature of the household was reasonably open to the Tribunal on the material before it for the reasons which it gave.
56. The manner in which the Tribunal proceeded does not reveal extreme illogicality, irrationality or legal unreasonableness, whether in fact finding or outcome such as to constitute jurisdictional error (see *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11 and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [130] – [135]). This is not a case in which no reasonable decision-maker could have reasoned in the manner of the Tribunal, having regard to the differences between Mr Multani's oral evidence and his written evidence and the information in the statements from Ms Ralph that he had provided in support of his visa application. The Tribunal's approach in this respect is not indicative of jurisdictional error.
57. The Applicant contended that the Tribunal failed to consider, or misread, his evidence about shared household activities and responsibilities. Regulation 1.15A(3)(b)(iii) refers to "*any sharing of*

the responsibility for housework”. It is the case that there was no express finding in that respect by the Tribunal. However a finding in relation to this matter can be inferred (see *He* at [85]). The Tribunal recorded the evidence of Mr Multani about sharing housework and cooking and often sharing meals with Ms Ralph when he was not working. Relevantly, its finding rejecting his claim of cohabitation at the time of decision (relevant to the cl.801.221(2) criterion under consideration) was a finding that was couched at a higher level of generality than any specific finding that could be made in respect of the sharing of housework and cooking (see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 325; [2001] HCA 30 at [91] per McHugh, Gummow and Hayne JJ and *He* at [85] discussed at [81]-[82] below). I accept that, as the First Respondent submitted, the Tribunal should be understood to be finding in its conclusion in relation to the nature of the household that it also did not accept the Applicant’s evidence as to the extent of any sharing of the responsibility of housework because it did not accept that he lived with Ms Ralph. No jurisdictional error is established on this basis.

58. Further, the “*evidentiary*” issues the Applicant raised about the Tribunal’s reliance on the statements from Ms Ralph which he provided to the Department and to the Tribunal (her statutory declarations of 25 July 2013, 22 August 2013 and 20 December 2014) do not establish jurisdictional error. Contrary to any suggestion that the Tribunal erred in not applying the rules of evidence, under s.353(1) (a) of the Act the Tribunal is not bound by technicalities, legal forms or “*rules of evidence*”. It was open to it to have regard to evidence, whether or not it contained hearsay. The Tribunal could inform itself on any matter that it saw fit, subject to complying with its obligations under Part 5 of the Act. It was not obliged to exercise its powers to summon the Applicant’s spouse and to administer an oath or affirmation to her pursuant to s.363(3)(a) and (d) before it could have regard to her statutory declarations.
59. Ms Ralph did not attend the hearing, despite the hearing letter invitation. Mr Multani also declined the Tribunal’s offer to contact her by telephone or to allow him time to contact her. No issue of the unreasonable exercise of a discretion arises (see *Minister for*

Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18).

60. Moreover, any suggestion that the fact that the Tribunal had regard to inconsistencies between Mr Multani's evidence and that of his sponsor involved a denial of procedural fairness is not made out. The sponsor's evidence was information provided by the Applicant to the Department or to the Tribunal in support of his claim to be her spouse within s.5F of the Act. The Tribunal had informed Mr Multani in the hearing invitation that it may wish to take evidence from his sponsor and asked him to "*please arrange for her to attend the hearing*". It also gave him the opportunity to have her give oral evidence. It appears from the Tribunal's account of what occurred in the Tribunal hearing (and this is not disputed by Mr Multani) that it raised its concerns in this respect and about the inconsistent evidence at the hearing.
61. No jurisdictional error is apparent on any of the bases raised by the Applicant in relation to the Tribunal findings about the nature of the household.
62. In relation to the Tribunal's consideration of the financial aspects of the relationship, Mr Multani contended that the Tribunal had decided issues against him by taking into account "*irrelevant considerations*". These were said to be "*such as*" the absence of regular deposits into the bank account, the fact the bank account was not used for most household expenses, the fact that for some time the bank statement went to the address of Ms Ralph's parents and the fact that he and that his spouse had no joint assets and debts. The submission referred to the fact Mr Multani gave evidence of the joint bank account, the separate bank card for Ms Ralph and that they used the joint bank account funds for household expenses.
63. As the First Respondent submitted, it has not been established that the Tribunal erred in taking into account mandatorily irrelevant considerations in the sense described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [1986] HCA 40 at 39 to 40. The Tribunal was obliged under reg.1.15A(2) to consider "*all the circumstances of the relationship*". The "*irrelevant*" matters the Tribunal was said to have taken into account were matters to which the Tribunal was entitled, and in some respects required, to

have regard in considering the factors specified in reg.1.15A(3)(a) of the Regulations. In particular, it was reasonably open to the Tribunal to have regard to whether and, if so, the extent to which, such evidence satisfied it that the Applicant and his spouse pooled their financial resources, as to any sharing of day-to-day household expenses and whether they had joint ownership of any assets or any joint liabilities in considering all of the matters within reg.1.15A(3)(a).

64. The fact that there was some supportive evidence provided by the Applicant, including limited documentary evidence of bank statements up to February 2014 for the joint bank account, was recognised and considered by the Tribunal, as outlined above. In considering all of the evidence before it, the Tribunal had particular regard to the absence of any evidence to corroborate Mr Multani's claims of financial dependence by Ms Ralph at the date of the decision in circumstances where he had said that her statement about their finances was incorrect and there were unexplained inconsistencies in the bank statements. The Tribunal specifically considered the bank statements (which ceased in February 2014), but found that they did not demonstrate financial interdependence (which the Tribunal was assessing at the time of decision). No jurisdictional error is established in the manner contended for by the Applicant in relation to the Tribunal's consideration of the financial aspects of the relationship.
65. In relation to the social aspects of the relationship, Mr Multani pointed out in his post-hearing written submission that he had provided statements from his friends and a friend of his spouse. It was contended that these statements had "*admittedly, showed*" that Mr Multani and Ms Ralph were regarded as a couple. It was suggested that while the Tribunal had rejected these statements on the basis that they were "*general and unconvincing*", it had erred in not providing any reason or basis for treating the statements as general or as to why it considered those statements to be unconvincing.
66. The Applicant also contended that he had provided a reasonable explanation for not remembering the name of his wife's sibling (that he had not spent very much time with her family). The Tribunal was said to have erred in failing to give any weight to this explanation and in finding that Mr Multani and his spouse did not represent themselves as

a couple. In addition, it was submitted that the Tribunal had unreasonably failed to treat the birthday party invitation as credible corroboration of the Applicant's oral evidence in support of the social aspects of the relationship.

67. The Tribunal did not "*admit*" or find that the supporting statements established that Mr Multani and Ms Ralph were a couple at the time of its decision. It merely acknowledged that the statements attested to them being a couple in 2012, 2013 and 2014. However, as the First Respondent submitted, and contrary to the Applicant's written submission, the Tribunal determined, on two alternative bases, not to place weight on the statements made by the friends of the Applicant and his spouse in considering whether it was satisfied that Mr Multani was Ms Ralph's spouse at the time of decision.
68. First, the Tribunal considered that the supporting statements were "*general and unconvincing*". When regard is had to the statements themselves, the Tribunal's characterisation is understandable. The statements were brief and did not advance any particular reasons as to why the writers considered the Applicant and his spouse's relationship to be genuine and continuing. One of Mr Multani's friends referred to Ms Ralph by an incorrect first name. Assessment of this evidence was a matter for the Tribunal and there was nothing inherently unreasonable or irrational about the Tribunal's characterisation of the statements in this way. Secondly, and in any event, the statements provided by the Applicant dated from 2012, 2013 and 2014. The Tribunal found that they were not evidence that friends and family "*currently*" (that is, at the time of the Tribunal decision) recognised Mr Multani and Ms Ralph as a couple or that they represented themselves in that way "*at the time of the decision*" (May 2016).
69. Having regard to the Tribunal's reasons as a whole, it was reasonably open to the Tribunal to find that Mr Multani was not a credible witness in light of the concerns it had detailed in relation to inconsistencies and other issues about his oral evidence and in circumstances where he gave evidence about spending time with his spouse's family and friends, but could not give the name of her only sibling or her best friend. Contrary to Mr Multani's submission, in considering the social aspects of the relationship the Tribunal had regard to his explanation

for his lack of knowledge (that he had not spent very much time with Ms Ralph's family and that she avoided her friends because she did not want to use drugs). In circumstances where the documentary evidence provided did not address the issue of whether friends and family "*currently*" recognised them as a couple or whether they represented themselves in that way "*at the time of decision*", it was also reasonably open to the Tribunal not to accept the oral evidence of Mr Multani in relation to the current social aspects of the relationship without credible corroboration. The Tribunal's concern was the existence of a genuine and continuing relationship at the time of decision and the only evidence before it in that respect was that of Mr Multani.

70. Furthermore, the Tribunal's view that the birthday party invitation was not sufficient to corroborate Mr Multani's claims in support of the social aspects of the relationship at the time of the decision is not indicative of jurisdictional error. It noted the absence of evidence as to the year in which the party was held. The Tribunal considered the evidence as a whole, but was not satisfied that such documentary evidence amounted to credible corroboration of Mr Multani's oral evidence about the relationship at the time of decision. It has not been established that the Tribunal fell into jurisdictional error in the manner contended for by the Applicant in considering the social aspects of the relationship.
71. Finally, in relation to the nature of the persons' commitment to each other (see reg.1.15A(3)(d)), in post-hearing submissions the Applicant referred to the fact that he had given oral evidence about future plans to purchase a house, claimed that he and his spouse had a lengthy spousal relationship and pointed out that the Tribunal had accepted that they were married in March 2012.
72. It was submitted that the Tribunal had erred in finding that Mr Multani and his spouse did not see themselves as having a long-term relationship, by taking into account "*irrelevant*" considerations "*such as*" the fact that he failed to give the name of the sibling and best friend of his spouse; the fact that he could not say what drugs Ms Ralph was taking; and the question of why his spouse did not give evidence at the Tribunal hearing.

73. Mr Multani's evidence was considered by the Tribunal. It was not obliged to accept his evidence about future plans and the relationship. As the First Respondent submitted, in so far as it was contended that the identified matters taken into account by the Tribunal were irrelevant considerations, it has not been established that they were "*irrelevant*" considerations in the sense considered in *Peko-Wallsend*. The Tribunal was entitled to have regard to whether and the extent to which the Applicant had an understanding of his spouse's addiction issues, why his spouse did not give evidence at the hearing and his limited knowledge of her family and friends. It did so in the context of considering the degree of emotional support and companionship, matters specified in reg.1.15A(3)(d)(iii). It was not irrational, illogical or unreasonable for the Tribunal to have regard to such matters in that context.
74. I am not satisfied that either the decision to which the Tribunal came or the path it followed in fact-finding involved an approach which no rational or logical decision-maker could have taken on the same evidence (cf *SZMDS* at [130] - [131]). The Tribunal reached its conclusions, both in fact finding and in its ultimate decision, in a reasonable fashion. There was a logical and probative basis for the Tribunal's findings. The outcome has not been shown to be plainly unjust, arbitrary, capricious or lacking in commonsense. There was an evident and intelligible justification for the Tribunal's conclusion that it was not satisfied that Mr Multani was Ms Ralph's "*spouse*" at the time of decision.
75. None of the post-hearing issues raised by the Applicant establish jurisdictional error on the part of the Tribunal.

The *He* Issue

76. That leaves for consideration an unpleaded issue which counsel for the First Respondent addressed in some detail. That issue is whether the Tribunal fell into jurisdictional error in failing to "*consider*" all the matters identified in reg.1.15A(3) of the Regulations.
77. As the First Respondent conceded, there was no finding made by the Tribunal in relation to the matter specified in subparagraph 1.15A(3)(b) (i), that is: "*any joint responsibility for the care and support of*

children”. This was in circumstances where there is no suggestion that there was any claim or evidence before the Tribunal that the Applicant and/or his spouse had any children or any responsibility in relation to the care and/or support of any children. It was acknowledged for the First Respondent that, on the authority of *He*, the absence of such a finding may be regarded as an error of law. As to whether this would amount to a jurisdictional error, the First Respondent made various submissions.

78. The Full Court of the Federal Court found in *He* (at [76]) that the requirement that the Tribunal “*consider*” the circumstances in reg.1.15A(3) meant that the Tribunal was required to make findings upon each of the prescribed matters numbered with Roman numerals. The Court explained at [76]:

... The legislative intention must be that these questions will be answered, not merely thought about. They must be answered so that the circumstances identified by the answers were included in the evaluation of whether there is a “married relationship”. In some cases, the Tribunal’s answer may be that there is no material, or insufficient material, to be able to form a conclusion on the prescribed matter... However, there must be an answer; or, in other words, a finding, even if the finding is that no conclusion can be reached upon the matter.

79. The Full Court also found (in *He* at [77]) that the requirement to “*consider*” the principal matters in paragraphs (a) to (d) in reg.1.15A(3) meant that the decision-maker must make findings upon each of those matters, albeit that in many cases the requirement to make findings upon such principal matters may be satisfied in the course of making findings upon the specific matters identified by Roman numerals.
80. The First Respondent acknowledged that the approach of the Federal Court in *He* required the Tribunal to make findings on each of the prescribed matters in reg.1.15A(3) in order to meet its obligation to “*consider*” all of the circumstances of the relationship, including the matter set out in subregulation (3) (as required under reg.1.15A(2) of the Regulations). It was conceded that, on one view, the Federal Court appeared to be stating that even if a listed matter was considered by the Tribunal not to be material, the Tribunal would err if it failed to address

it, for example by stating that it could not reach a conclusion on a particular matter because there was insufficient evidence or that the matter was insignificant or that it had been displaced by other more significant factors.

81. However counsel for the Minister drew the court's attention to the fact that the Federal Court in *He* accepted (at [82]) that a Tribunal's reasons did not have to be structured in a manner that formulaically addressed each of the relevant matters in turn. Further, while the Court pointed out in *He* at [87] that where a statute required that consideration be given to specified matters it was preferable for a decision-maker to expressly refer to such matters, it was suggested at [85] - [86] that the obligation to make findings in order to evidence consideration of the factors in reg.1.15A(3) was not intended to be a reference to express findings only, in that an inference may be available from the Tribunal's reasons, read as a whole, that the Tribunal did make a finding on a particular matter as part of its mental process in making a decision.
82. I accept that, as the First Respondent submitted, with the one exception of the matter in reg.1.15A(3)(b)(i), the Tribunal made findings on each of the matters listed in reg.1.15A(3) both in respect of the principal matters in paragraphs (a) to (d) in reg.1.15A(3) and also in respect of each of the prescribed matters numbered with Roman numerals in that subregulation. That includes the issue of any sharing of the responsibility for housework referred to in reg.1.15A(3)(b)(ii) which, it can be inferred, was necessarily encompassed in the finding of greater generality that the couple were not living together. As summarised above, it is apparent from a consideration of the Tribunal's reasons that it can be inferred that the Tribunal made a finding on shared housework as part of its mental process in making the decision.
83. However it was not suggested, and is not apparent, that it can be inferred that the Tribunal made any finding about any joint responsibility for the care and support of children. There was no reference to the absence of relevant children in the Tribunal's reasons.
84. In these circumstances, while recognising the general principle that this court is bound to follow a decision of the Full Court of the Federal Court, the First Respondent formally submitted that in so far as *He* stood for the proposition that "*consideration*" of a particular matter

required there to be a finding of fact made by the Tribunal, then it was wrongly decided.

85. The First Respondent also contended that the approach taken in *He* was inconsistent with at least two judgments of the High Court, being the decisions in *Yusuf* and *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1 and that, to the extent of such inconsistency, this court ought to follow the approach of the High Court in relation to what is required in order to evidence “*consideration*” of a particular matter on the part of a decision-maker such as the Tribunal (rather than the approach taken in *He*).
86. In the alternative, the First Respondent submitted that if the failure to make a finding about the matter in reg.1.15A(3)(b)(i) was an error of law, it was not a jurisdictional error.
87. I agree with this last submission. Hence it is unnecessary in this case to consider whether the decision in *He* is inconsistent with the decisions of the High Court in *Yusuf* and *SZGUR* or to address the First Respondent’s associated argument that the reasoning of the Full Court of the Federal Court in *Minister for Home Affairs v Buadromo* (2018) 362 ALR 48; [2018] FCAFC 151 sits “*at the very least ... very uncomfortably*” with the Full Court’s earlier reasoning in *He*.
88. I am of the view that it is sufficient, in this case, to have regard to the reasoning of the High Court in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34 in relation to whether an error by the Tribunal is a jurisdictional error. Assuming, for present purposes, that the Tribunal’s failure to make a finding in relation to any joint responsibility for the care and support of children in circumstances where there was no suggestion that either party to the marriage had children or had responsibility for any children, was a failure to consider the matter prescribed in reg.1.15A(3)(b)(i), I accept that, as the First Respondent submitted, such error was not of the magnitude that would result in taking the decision outside the jurisdiction conferred by the Act in the sense considered in *Hossain*.
89. As Kiefel CJ, Gageler and Keane JJ stated in *Hossain* at [29] to [30]:

29. That a decision-maker “*must proceed by reference to correct legal principles, correctly applied*” is an ordinarily (although not

universally) implied condition of a statutory conferral of decision-making authority. Ordinarily, a statute which impliedly requires that condition or another condition to be observed in the course of a decision-making process is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition. The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.

30. Whilst a statute on its proper construction might set a higher or lower threshold of materiality, the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made. The threshold would not ordinarily be met, for example, where a failure to afford procedural fairness did not deprive the person who was denied an opportunity to be heard of “the possibility of a successful outcome”, or where a decision-maker failed to take into account a mandatory consideration which in all the circumstances was “so insignificant that the failure to take it into account could not have materially affected” the decision that was made.

90. (Footnotes omitted)

91. Edelman J explained in *Hossain* at [72]:

... although the issue will always be one of construction of the express or implied terms of the statute, an error will not usually be material, in this sense of affecting the exercise at power, unless there is a possibility that it could have changed the result of the exercise of power. In other words, materiality will generally require the error to deprive a person of the possibility of a successful outcome.

92. His Honour also pointed out in *Hossain* at [74] that the consideration of materiality “looks backwards to whether the error would have made any difference to the result” (in contrast to the approach to be taken in considering the residual discretion to refuse relief).

93. In this case, the failure of the Tribunal to make a finding on the factor specified in subparagraph 1.15A(3)(b)(i) of the Regulations could not possibly have made any difference to the outcome such as to have deprived Mr Multani of the possibility of a successful outcome. There was (and is) no suggestion that either party to the marriage had any

children, let alone any responsibility in relation to the care and/or support of any children. The failure to make a finding in relation to any joint responsibility for the care and support of children when there were no relevant children “*could not have materially affected the decision that was made*” (*Hossain* at [30]). It could have made no difference to the decision in the circumstances in which it was made.

94. Hence, I am not satisfied that any such error on the part of the Tribunal amounted to a jurisdictional error.
95. As no jurisdictional error has been established, the application must be dismissed.

I certify that the preceding ninety-four (94) paragraphs are a true copy of the reasons for judgment of Judge Barnes

Associate:

Date: 30 January 2020